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No. 06-1176

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In The

Supreme Court of the United States

HIGH COUNTRY CITIZENS' ALLIANCE;
TOWN OF CRESTED BUTTE, COLORADO;
THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GUNNISON, COLORADO,

Petitioners,

v.

KATHLEEN CLARKE, DIRECTOR, THE UNITED
STATES BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit**

OPPOSITION TO WRIT OF CERTIORARI OF U.S. ENERGY CORP. AND CRESTED CORP.

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QUESTION PRESENTED

Whether Congress intended to preclude judicial review under the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.* of a decision by Bureau of Land Management to issue a patent where judicial review is sought by third parties with no ownership interest in the claimed lands.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, United States Bureau of Land Management ("BLM"), BLM Colorado State Director, the Secretary of the Interior and the United States Department of the Interior are governmental respondents in this case. Phelps Dodge Corporation ("Phelps Dodge") and Mt. Emmons Mining Company ("MEMCO") were private defendants in the underlying actions. Crested Corp., a Colorado corporation ("Crested"), and U.S. Energy Corp., a Wyoming corporation ("U.S. Energy") are the successors in interest with respect to the patent and lands at issue in this case to MEMCO and Phelps Dodge.

On September 8, 2006, U.S. Energy and Crested filed a Motion to Substitute Parties Pursuant to Fed. R. App. 43(b) and a Motion for Leave to File Response to HCCA's Petition for Rehearing En Banc. The Court of Appeals never ruled on either motion, but accepted U.S. Energy's and Crested's Response. Because MEMCO and Phelps Dodge no longer hold any interest in this controversy, and because U.S. Energy and Crested are the real parties in interest, U.S. Energy and Crested are the only non-governmental parties filing an opposition to the petition for writ of certiorari.

Crested Corp. is majority owned by U.S. Energy. U.S. Energy has no parent company. Except for U.S. Energy's ownership of Crested, no publicly traded company owns more than 10% of U.S. Energy or Crested Corp.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

U.S. Energy Corp. ("U.S. Energy") and Crested Corp. ("Crested") respectfully submit this Opposition to Petition for Writ of Certiorari.

STATUTES AND REGULATIONS INVOLVED

The General Mining Law of 1872 provides, in relevant part:

> A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim . . . , having claimed and located a piece of land for such purposes, who has, or have, complied with [applicable requirements] . . . may file in the proper land office an application for a patent, under oath, showing such compliance . . . shall thereupon be entitled for a patent to the land, in the manner following: The register of the land office . . . shall publish a notice that such application has been made. . . . If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with [applicable requirements].

30 U.S.C. § 29.

> Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings . . . shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction. . . . It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the right of possession. . . . After such judgment shall have been rendered, . . . a patent shall issue thereon for the claim. . . .

30 U.S.C. § 30.

Department of the Interior regulations pertaining to 30 U.S.C. §§ 29 and 30 state, in relevant part:

> The adverse claim must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. . . .

43 C.F.R. § 3871.2(a).

> At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings.

43 C.F.R. § 3872.1(a).

The Administrative Procedure Act provides, in relevant part:

> § 701. Application; definitions
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that –
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> § 702. Right of review
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §§ 701-02.

STATEMENT OF THE CASE

This case concerns the availability of judicial review of a final administrative decision, and arises under the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.* (the "Mining Law"). Specifically, the issue in this case is whether Congress intended that there be judicial review of a decision of Bureau of Land Management ("BLM") to issue a mineral patent where a protest to the patent is

brought by a third party with no ownership interest or competing claim to the property.

On December 30, 1992, Mt. Emmons Mining Company ("MEMCO") filed an application for a mineral patent under the Mining Law. The Mining Law, like many other federal public lands statutes, allows private parties to take title to lands of the United States to serve and promote the policies determined by Congress.[1] MEMCO complied with all the statutory prerequisites to the issuance of the patents, including making the statutory payment for the claims to be patented and providing a detailed mineral report showing the discovery of a valuable mineral deposit.

In 1993, Petitioners filed an administrative protest with BLM, objecting to MEMCO's patent application. The Petitioners are county commissioners, a local town, and an environmental group opposed to mining. These Petitioners do not have any competing ownership interest in the lands subject to the patent application. Under the Mining Law, third parties with no competing claim to the lands for which a patent is sought may file a formal administrative protest to a pending decision to issue a mineral patent. 30 U.S.C. § 29; 43 C.F.R. § 3872. Third parties asserting a competing mineral claim to the same lands as those to be patented have a different status under the Mining Law and are subject to different procedures. *See* 30 U.S.C. §§ 29-30; 43 C.F.R. § 3871. In four filings with BLM,

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[1] Most lands patented by the United States were patented under homestead entries, statehood grants, railroad grants, and other non-mineral public land laws. Mineral patents represent about 1.5 percent of all public lands patented. Congressional Record Service Report for Congress, Mining on Federal Lands: Hardrock Mining at CRS-3, March 8, 2007 ("CRS Report").

including a supplemental protest filed in 2001, Petitioners presented their concerns with MEMCO's patent application. In a detailed twelve-page opinion issued on April 2, 2004, BLM considered each of Petitioners' concerns and concluded that Petitioners' allegations "were unsupported in fact and law." Also on April 2, 2004, BLM issued the mineral patent to MEMCO (the "Patent").

On April 14, 2004, Petitioners filed this lawsuit in United States District Court for the District of Colorado challenging the Patent. Petitioners brought claims against BLM, its director, the director of Colorado BLM and the Department of the Interior ("Governmental Defendants"). Petitioners also brought claims against MEMCO and its parent, Phelps Dodge Corporation ("Phelps Dodge").[2]

In the claims relevant to their petition for certiorari, Petitioners alleged violations of the Mining Law, applicable regulations and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). Petitioners sought relief in the form of an injunction to suspend, rescind or void the Patent; an injunction against BLM prohibiting issuance of the Patent; a declaration that the mining claims do not qualify for patenting under the Mining Law; and a declaration that the Governmental Defendants violated the Mining Law and the APA. (Pet. 46a-47a.)

The district court, after concluding that the Mining Law precludes judicial review of Petitioners' claims under the Mining Law and the APA, dismissed those claims for lack of subject matter jurisdiction.

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[2] U.S. Energy and Crested are the successors in interest with respect to the patent and lands at issue in this case to MEMCO and Phelps Dodge.

A panel of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals"), with one dissenting judge, affirmed the decision of the district court. The Court of Appeals found that the statutory scheme of the Mining Law, the weight of legislative and judicial history, and contemporaneous legal decisions coupled with congressional acquiescence in such decisions, demonstrated that Congress intended to preclude judicial review of claims for third party protesters seeking to attack a government patent issued under the Mining Law.

Petitioners petitioned for rehearing *en banc*. The Governmental Defendants, U.S. Energy and Crested objected, noting that there was nothing about the case that warranted the extraordinary procedure of reconsideration *en banc*. All of the judges on the Court of Appeals, save the lone dissenter from the panel decision, agreed, and denied the petition for rehearing.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN AUTHORITY OR CONFLICTING PRECEDENT

This case concerns the narrow issue of whether Congress has provided for judicial review of the issuance of a mineral patent under the Mining Law where a protest to the patent is brought by a third-party with no competing ownership interest in the property. This Court, in *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984), established the test to be used when determining whether Congress intended to allow judicial review of administrative actions. Applying *Block* and other settled precedent to the limited facts of this case, the Court of Appeals held that no such review is available.

The Court of Appeals noted that the question of whether Petitioners, "who claim no adverse interest in the land, [may] bring a suit challenging the issuance of a patent under the 1872 Mining Law, *is a matter of first impression.*" (Pet. 4a, emphasis added.) U.S. Energy and Crested are unaware of any decision of any court that conflicts with this single decision on the issue presented by the petition for certiorari, and Petitioners do not cite to any.

There is no split of authority or other conflict, then, that requires resolution by this Court.

II. NO IMPORTANT QUESTION OF FEDERAL LAW IS AT ISSUE

Federal courts regularly apply the test established in *Block* for determining whether judicial review of administrative decisions is available under the APA. *See*, *e.g.*, *United States v. Fausto*, 484 U.S. 439, 447-49 (1988) (applying *Block* to determine that structure of Civil Service Reform Act demonstrates congressional intent to preclude judicial review of certain employment decisions of federal administrative agencies); *Dew v. United States*, 192 F.3d 366, 372-74 (2d Cir. 1999) (under *Block*, structure of statute reveals congressional intent to preclude judicial review of claims by employees of the intelligence community); *Overton Power Dist. No. 5 v. O'Leary*, 73 F.3d 253 (9th Cir. 1996) (power suppliers do not have standing to seek judicial review of rate decision of Federal Energy Regulatory Commission; applying *Block* test to determine that judicial review precluded by statutory scheme). This case is simply another routine application of *Block* and its

progeny to one of the many administrative proceedings provided for by Congress.

Petitioners claim that this case is extraordinary because it affects "vast amounts" of public land and because it condones an "unlawful" transfer of those lands. Neither premise withstands scrutiny. First, Congress has placed a moratorium on the processing of mineral patent applications under the Mining Law, and therefore the sphere of influence of the Court of Appeals' decision is quite small. This moratorium will likely stay in place absent broader congressional action with respect to the Mining Law. Second, the BLM decision was correct and lawful. Even so, the Court of Appeals did not consider the correctness of the BLM decision. Rather, it merely analyzed whether there could be judicial review of that decision.

A. The Effect of the Court of Appeals' Decision is Quite Limited

1. For Over Thirteen Years, There Has Been a Moratorium on Issuing Mineral Patents

In 1993, in the face of political criticism of the Mining Law, the Secretary of the Interior issued an order prohibiting BLM state directors from issuing mineral patents. Secretarial Order No. 3163 (March 2, 1993). The following year, Congress enacted a similar moratorium by withholding all funding for the processing of mineral patent applications filed after the enactment of the moratorium. Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 103-332, §§ 112, 113, 108 Stat. 2499, 2519 (1994). For the past thirteen years, therefore, BLM

has only processed mineral patent applications filed prior to September 30, 1994.

Nonetheless, Petitioners argue that the decision of the Court of Appeals affects "a vast amount of land," and imply that the "vast amount" is 4.4 million acres. (Pet. at 10.) Simple arithmetic shows that Petitioners' claim is spurious.

Currently there are 49 mineral patent applications pending with the BLM that are not subject to the moratorium. *See* BLM 2007 Budget Justification to Congress at 321, http://www.blm.gov/budget/2007just.html. Therefore, the total amount of federal land potentially affected by the Court of Appeals' decision is exceedingly small – significantly less than the "vast amount" claimed by Petitioners, by several orders of magnitude.

Petitioners acknowledge the moratorium, but argue that Congress could choose not to continue to renew it. (Pet. at 10, fn.5.) Each and every year since its enactment, however, Congress has renewed the moratorium. *See*, *e.g.*, Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 109-54, Sec. 408 (2006). Further, as discussed in the following section, any failure to reenact the moratorium will likely be part of a broader revision of the Mining Law that will render the Court of Appeals' decision in this case moot. Indeed, Congress enacted the moratorium as a prelude to legislative reform of the Mining Law. *See* 140 Cong. Rec. H 9108 (daily ed. Sept. 13, 1994) (statement of Rep. Regula). There is no reason to believe it will be lifted absent reform of that law.

2. The Moratorium Is Tied To Broader Congressional Action With Respect to the Mining Law

Because the Mining Law has remained relatively unchanged since the 19th century, it has in recent years been subject to "vigorous debate as to whether a law enacted in 1872 still serves the needs of the mining industry and can at the same time reflect modern thinking on disposal of federal lands and environmental protection in tension with contemporary views on the environment and land use." Randy Hubbard, *The 1872 Mining Law: Past, Present and Future?*, 17-WTR Nat. Resources and Env. 149, 150 (2003). Accordingly, Congress has continually considered changing the 1872 Mining Law. *See, e.g.*, Mining Law Reform Act of 1991, S. 433, 102nd Cong. (1991); Mineral Exploration and Development Act of 1993, S. 257, 103rd Cong. (1993); Mineral Exploration and Development Act of 2002, H.R. 4748, 107th Cong. (2002); Federal Mineral Development and Land Protection Act of 2005, H.R. 3968, 109th Cong. (2005); *see also* CRS. Report at CRS-10 ("Broad-based legislation to reform the General Mining Law of 1872 may be introduced in the 110th Congress as in previous Congresses."); Oversight Plan, House Committee on Natural Resources (2007), http://resourcescommittee.house.gov/about/oversight.shtml (House Committee on Natural Resources lists "Reform of the 1872 Mining Law" as part of the committee agenda). Current proposals would moot the Court of Appeals' decision here. *See, e.g.*, Federal Mineral Development and Land Protection Act of 2005, H.R. 3968, § 110 (would disallow the issuance of mineral patents); § 504 (would provide that the United States district courts have jurisdiction over "citizen suits" alleging a violation of the act); CRS Report at CRS-6

(describing prior congressional proposals to amend the claim-patent system).

It is therefore likely that the moratorium will remain in place until Congress passes new legislation that would revise the Mining Law. In light of the legislative posture of the Mining Law, both through the steadfast renewal of the moratorium and the continued debate over amendment of this law, the decision of the Court of Appeals is fact-specific.

B. The Court of Appeals' Decision Merely Reaches the Unremarkable Conclusion that an Administrative Agency Makes the Final Determination of a Claimant's Case

Petitioners attempt to manufacture an important federal question by repeatedly characterizing the Court of Appeals' holding as allowing the "unlawful" transfer of federal lands. (*See, e.g.*, Pet. at 10, 11, 13 and 15.) Petitioners' rhetoric is designed to mislead this Court, because the BLM decision was lawful and, more significantly, because the merits of the BLM decision were not at issue before the Court of Appeals.

The issuance of the Patent was lawful. The BLM considered three protests and a supplemental protest lodged by Petitioners, and properly determined that the lands at issue held a valuable deposit of molybdenum. (Pet. 3a.) As described more fully in Section III(A)(2), *infra*, once the BLM determines that the lands at issue include the discovery of a valuable mineral deposit, and that the applicant has met certain procedural requirements, BLM has a ministerial and nondiscretionary duty to issue a patent.

Nonetheless, the merits of the BLM decision were not considered by the Court of Appeals. Rather, the Court of Appeals analyzed whether Congress permitted judicial review of a protest before the agency. There is nothing exceptional about the conclusion of the Court of Appeals that this agency makes a final determination of certain issues. This Court and others routinely conclude that a federal agency, and not the judiciary, makes the final determination of a matter within the congressionally mandated jurisdiction of that agency.[3] The Court of Appeals'

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[3] *See, e.g., Block*, 467 U.S. 340; *Fausto*, 484 U.S. at 447-49 (Civil Service Reform Act precludes judicial review of employment suspensions for certain classes of federal employees); *Switchmen's Union of North America v. Nat'l Mediation Bd.*, 320 U.S. 297, 300-05 (1943) (decision of National Mediation Board to certify collective bargaining representatives not subject to judicial review); *Fligiel v. Samson*, 440 F.3d 747, 752-54 (6th Cir. 2006) (broad class of adverse personnel actions by the Veterans' Administration not subject to judicial review); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-62 (10th Cir. 2004) (Quiet Title Act precludes judicial review of Department of Interior's decision to place property into trust for an Indian tribe); *Jordan Hosp., Inc. v. Shalala*, 276 F.3d 72, 77 (1st Cir. 2002) (Health Care Financing Administration's Medicare reimbursement classification decisions not subject to judicial review); *Ismailov v. Reno*, 263 F.3d 851, 854-855 (8th Cir. 2001) (Board of Immigration Appeals decision regarding whether application for asylum was properly filed not subject to judicial review); *Dew*, 192 F.3d at 372-74 (judicial review is precluded for Federal Bureau of Investigation decisions regarding claims under the Uniformed Services Employment and Reemployment Rights Act); *Overton Power Dist. No. 5*, 73 F.3d at 255-56 (no judicial review of power resellers' objection to Western Power Administration's rate setting decision; only power supply contractors may seek such review); *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 615 (7th Cir. 1987) (Bureau of Prisons' decision whether to seek reduction of sentence is not subject to judicial review); *Hitachi Metals, Ltd. v. Quigg*, 776 F. Supp. 3, 7-9 (D.D.C. 1991) (third-party protestors may not seek judicial review of patent and trademark office's decision to reissue patent).

decision, then, is not extraordinary and, as discussed below, is consistent with the purposes of the Mining Law.[4]

C. Summary

The Court of Appeals' decision applies settled law to a specialized statute that, due to a congressional moratorium, has limited effect. Because the moratorium is tied to potential revision of the Mining Law, this lessens the likely future impact of the lower court's decision. The Court of Appeals decision reaches the unremarkable conclusion that, as with many other statutes and regulations, the agency makes a final determination of matters within its congressionally mandated jurisdiction and expertise. There is no important question of federal law that warrants review from this Court.

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[4] The Petition implies that because public lands are at issue, the Court of Appeals' conclusion that BLM makes the final determination of third-party non-owner protests is all the more significant. As an initial matter, as discussed in Section II(A)(1), *supra*, the lands affected by this case are actually quite limited. Further, federal agencies are often empowered to privatize federal lands. *See, e.g.*, Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1713 (authorizing the sale of public lands) and § 1716 (authorizing the disposal of lands by exchange); Reclamation Act, 43 U.S.C. § 374 (providing for the sale of public lands to finance reclamation projects); Stock and Homestead Raising Act of 1916, 43 U.S.C. §§ 291-301 (repealed by FLPMA) (making land grants to homesteaders); Desert Lands Act of 1877, 43 U.S.C. §§ 311-339 (repealed by FLPMA) (land grants to farmers in arid lands); Act of July 1, 1862, 12 Stat. 489 (an expansive land grant to railroad).

III. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW AND REACHED THE PROPER CONCLUSION; MOREOVER, THIS COURT WILL RARELY ACCEPT CERTIORARI REVIEW WHEN A LOWER COURT MERELY MISAPPLIES SETTLED LAW

Petitioners dedicate the bulk of their Petition to the argument that the Court of Appeals misapplied the relevant law. The Court of Appeals, however, correctly applied the law and reached the correct conclusion. Moreover, even had the Court of Appeals erred, the misapplication of settled law is not a compelling reason for review from this Court.

A. The Court of Appeals Correctly Applied the Law and Reached the Proper Decision

The Court of Appeals correctly concluded that neither the APA nor the Mining Law afford Petitioners judicial review.

1. The Administrative Procedure Act Creates a Rebuttable Presumption of Reviewability

The APA provides for a limited waiver of the United States' sovereign immunity from suit for persons suffering a legal wrong because of agency action, but also limits this waiver of sovereign immunity when a statute specifically precludes judicial review of agency action. 5 U.S.C. § 701(a). To determine whether a statute precludes judicial review, courts must consider the express language of the statute, its overall statutory scheme and objectives, and its legislative history. *Block*, 467 U.S. at 345.

The statute at issue here, the Mining Law, does not expressly address judicial review of third-party protests. (Pet. 9a.) Accordingly, the Court of Appeals applied three *Block* factors in analyzing whether the presumption of reviewability has been overcome: (1) "contemporaneous judicial construction barring review and the congressional acquiescence in it"; (2) "the collective import of legislative and judicial history"; and (3) "inferences of intent drawn from the statutory scheme as a whole." (Pet. 8a, *citing Block*, 467 U.S. at 349.) Any one of these factors is sufficient to discern the requisite congressional intent. *Block*, 467 U.S. at 349.

In *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977), this Court specified that a court must find a "clear and convincing" indication of intent to preclude judicial review. Petitioners invoke the phrase "clear and convincing," and argue that the Court of Appeals did not properly apply this standard. (*See, e.g.*, Pet. at 11.) Simple invocation of this phrase is misleading. A "clear and convincing evidence" test, in the normal sense in which courts interpret that phrase, does not apply. *Gott v. Walters*, 756 F.2d 902, 911 (D.C. Cir. 1985) (Scalia, J.). The "clear and convincing" standard is "not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review is controlling." *Block*, 467 U.S. at 351. The presumption for judicial review is overcome whenever "congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Id.*; *accord Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 157 (1970). Thus, the Petitioners would need to show that there is some "substantial

doubt" about congressional intent, and that such intent is not "fairly discernible" from the statutory scheme. As shown below, there is no doubt about congressional intent to preclude the judicial review that Petitioners seek.

2. The Language and Structure of the Mining Law Precludes Judicial Review

The statutory scheme of the Mining Law precludes judicial review of claims by third-party protestors.

The Mining Law provides the statutory basis for mineral development on the public lands owned by the United States. Upon locating valuable mineral deposits, citizens may file mining claims on public lands open to mineral location. 30 U.S.C. § 22. Staking a mining claim gives the owner "exclusive possession of the claim, including the right to extract all minerals from the claim. . . ." *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 934 (9th Cir. 1998). The Mining Law also allows the mining claim's owner to obtain fee title to the minerals and the surface of the claim pursuant to a "patent" issued by the federal government upon the patentee's compliance with certain legal requirements. 30 U.S.C. § 29; 43 C.F.R. § 3862.

BLM administers mining claims on the public lands. After a patent application is filed, BLM must verify whether the patent application is complete and complies with all statutory requirements. 30 U.S.C. § 29; *Cameron v. United States*, 252 U.S. 450, 464 (1920). The judgment of BLM on patenting "as to matters of fact, properly determinable by [it], is conclusive" and "unassailable" in a collateral proceeding. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 640 (1881). The duty to issue the patent is ministerial and nondiscretionary

once BLM has determined that the applicant has complied with all legal requirements for patenting. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 501 (10th Cir. 1991); *South Dakota v. Andrus*, 614 F.2d 1190, 1993 (8th Cir. 1980).

There are three categories of non-governmental parties that may have input into BLM's decision of whether a patent should be issued: (1) the patent applicant, (2) a rival claimant, and (3) a third-party with no ownership interest in the land at issue ("protesters"). *See* 30 U.S.C. §§ 29, 30; 43 C.F.R. §§ 3862, 3871, 3872. Petitioners fall within this third category.

Protesters may challenge a patent application by filing a protest with BLM prior to patent issuance. 30 U.S.C. § 829; 43 C.F.R. § 3872. Neither the Mining Law itself, nor the BLM regulations, however, provide protesters with rights to judicial review. Rival claimants to patented property by contrast are entitled to judicial review of their claims pursuant to Sections 29 and 30 of the Mining Law. If Congress had intended to provide protesters with judicial review, Congress would have included similar review provisions in Sections 29 and 30.[5]

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[5] Petitioners claim that the Court of Appeals' conclusion that the statutory scheme precludes judicial review of claims by third-party protestors conflicts with cases that consider appeals from protestors. (Pet. at 16.) None of the cases cited by Petitioners, however, involve administrative or judicial review of a protestor's challenge to an already issued patent. *American Colloid Co. v. Hodel*, 701 F. Supp. 1537, 1539 (D. Wyo. 1988) involved a competing claimant challenging the validity of mining claims *prior* to patent issuance; *Wilderness Soc'y Great Bear Found.*, 151 IBLA 346 (2000) involved the continuing validity of a Solicitor's opinion, not appeal of patent issuance; *Agri Beef Co.*, 148 IBLA 58 (1999) involved denial of a protest by a neighboring landowner that complained of the mining claimants' trespass, but the challenge

(Continued on following page)

Cf. Dew, 192 F.3d at 373 (because the statute addresses the rights of a certain class of claimants "yet does not include them in provisions for judicial review, we believe that judicial review . . . is precluded").

The current structure of the Mining Law simply does not allow a third-party protestor to judicially challenge the issuance of a mining permit. Petitioners may be unhappy with the Mining Law, but it is up to Congress, not the courts, to change it. As the district court in this case concluded:

> This Court cannot amend the law by judicial fiat. No matter how desirable or necessary, as a policy matter, a private cause of action for unrelated third parties might be, the Court cannot create one. [Citation omitted]. Only Congress can modernize the 1872 Mining Law to expand the role of unrelated third parties.

(Pet. 57a.)

3. Legislative History Shows Intent to Preclude Judicial Review

The legislative history of the Mining Law also supports the conclusion that the Mining Law precludes judicial review of claims by third-party protestors.

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occurred *prior* to issuance of the patent; *Scott Burnham*, 100 IBLA 94 (1987) involved a competing claimant that filed an appeal to a protest *prior* to issuance of the patent. Moreover, none of these cases involve judicial review of patent *issuance*, which is what Petitioners seek. Petitioners have not cited to any case in which any court has entertained a challenge by anyone other than the United States seeking to nullify an existing patent.

The Mining Law, and its precursors, the Lode Law of 1866 and the Placer Act of 1870,[6] reflected a tension between eastern senators who sought to maximize revenue for the Civil War, and western senators who sought to maximize mineral development and settlement. *See* Cong. Globe, 38th Cong., 2nd Sess., at 684-687 (1865); Cong. Globe, 39th Cong., 1st Sess., at 301 (1866). Both factions agreed, however, that the mining laws must establish permanent and secure title to the mineral lands in the miners who would develop those lands. *See* Cong. Globe, 38th Cong., 2nd Sess., at 684-687 (1865); *accord* Cong. Globe, 39th Cong., 1st Sess., at 3225 (1866), Cong. Globe, 41st Cong., 2nd Sess., at 4403-04 (1870); Cong. Globe, 42nd Cong., 2nd Sess., at 532-34 (1872).

The Mining Law sought to redress vagrancy and a lack of development of the mineral estate in the western states that created problems for law and order and also limited badly needed tax revenues. Curing the lack of fixed property interests was a fundamental purpose of the Mining Law. *See* Cong. Globe, 38th Cong., 1st Sess., 2557-2559 (1864). Congress sought to provide security of title through the Mining Law because "the whole region was in litigation," which limited investment in mineral development,

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[6] Because the Mining Law is essentially a reworking of the Lode Law of 1866 and the Placer Act of 1870, and because legislative history shows that Congress intended the Mining Law would incorporate these statutes, Cong. Globe, 42nd Cong., 2nd Sess., at 532-34 (1872), the legislative history of those acts should be considered along with the legislative history of the Mining Law. "The 1866 law was modified but essentially carried forward in the 1870 and 1872 statutes . . . " and "were recodified and reshaped in the Mining Law of 1872. . . ." John D. Leshy, *The Mining Law: A Study in Perpetual Motion*, 11, 16 (1987). The Court of Appeals correctly found this legislative history relevant. (Pet. 10a.)

prevented the settlement of towns and villages, and diminished potential tax revenues. Cong. Globe, 42nd Cong., 2nd Sess., at 2459 (1872). The legislative history shows that security of title was a paramount consideration of Congress in enacting the Mining Law and its predecessors. Permitting protesters or other third parties claiming no ownership interest in the claims or land to challenge government patenting decisions would frustrate this purpose.

4. Contemporaneous Judicial Decisions Reflect Congress' Intent to Preclude Judicial Review and Congress Has Acquiesced in this View

Contemporaneous judicial decisions and judicial history also support the conclusion that the Mining Law precludes judicial review of claims by third-party protestors.[7] The Court of Appeals correctly concluded that "it is essentially undisputed that the cases . . . uniformly preclude persons situated similarly to Petitioners, that is, not claiming a property interest in the land, from judicially contesting the validity of the patent." (Pet. 16a.)

As early as 1881, this Court held that a patent is "not open to rebuttal in an action at law," and found that if in a suit for possession of a mining claim the patent owner had to "establish the validity of the action of the Land Department (BLM's predecessor) and the correctness of its ruling upon matters submitted to it, the patent, instead of

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[7] "[T]here have generally prevailed throughout most of the Mining Law's existence numerous technical legal doctrines counseling against judicial scrutiny of actions by federal agencies. . . ." John D. Leshy, *The Mining Law: A Study in Perpetual Motion*, 20 (1987).

being a means of peace and security, would subject his rights to constant and ruinous litigation." *Kemp*, 104 U.S. at 640-41. Absent a claim that the patent was not available for patenting (because it was not federally owned), a "patent is unassailable for mere errors of judgment." *Id.* at 646.

Similarly, in *Wight v. Dubois*, 21 F. 693, 694 (C.C.D. Colo. 1884) the court considered whether a party claiming no property interest in the land could challenge the issuance of a mining patent. The court found that the plaintiff's sole remedy was to file an objection with the Land Department (BLM's predecessor) and that once the Land Department denied such protest, the plaintiff had no "further right or remedy." *Wight*, 21 F. at 694 ("when grantor and grantee are satisfied, a stranger has nothing to say"). While Congress has amended the Mining Law numerous times,[8] Congress has not amended the Mining Law to provide a judicial cause of action for protesters. While congressional silence by itself is not enough to find acquiescence, this Court has found acquiescence in circumstances similar to the case at hand. *See Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction . . . and we therefore may assume that our interpretation was correct."). Moreover, recent proposed legislation indicates that Congress does not believe that the Mining Law currently provides judicial

[8] *See e.g.*, Act of February 11, 1897, 29 Stat. 526; Act of June 6, 1900, 31 Stat. 321; Act of January 31, 1901, 31 Stat. 745; Act of February 12, 1903, 32 Stat. 825; The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*; Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521 *et seq.*; Multiple Use Mining Act of 1955, 30 U.S.C. §§ 601-603, 611-615.

review to third-party protestors. *See, e.g.*, Federal Mineral Development and Land Protection Act of 2005, H.R. 3968 § 504 (would provide judicial review of "citizen suits").

In addition, issuance of a patent creates a conclusive presumption that all Mining Law requirements were satisfied. *See e.g., Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Milling Co.*, 196 U.S. 337, 353 (1905); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 451 (1882); *Kemp*, 104 U.S. at 640.

There is no post-APA case law that speaks directly to the issue at hand, likely because no one before now thought that protesters have any right of judicial review. Post-APA judicial decisions in analogous situations are consistent with earlier precedent establishing that mineral patents are not subject to collateral attack. In *Kale v. United States*, 489 F.2d 449, 454 (9th Cir. 1973), for example, the Ninth Circuit held that "a United States patent is protected from easy third-party attack." In *dicta*, the Ninth Circuit has also noted in regard to a mining patent that a patent is "an official declaration of title which is, with limited exceptions, unassailable and not rebuttable." *United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999); *accord Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976) ("As a matter of federal law, it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third-party against the . . . patentee. . . . Simply stated, a plaintiff in such case has no cause of action . . . ; the integrity of such transaction could be upset if a grantee became liable to an amorphous class of third persons").

5. Summary

The statutory scheme of the Mining Law, legislative history of that law and congressional acquiescence to contemporaneous judicial decisions, all support the conclusion that Congress intended to preclude judicial review of a BLM decision denying a third-party protest concerning a patent application.

B. A Misapplication of Settled Law Does Not Warrant Certiorari Review

Even had the Court of Appeals erred, that does not warrant review from this Court. There is no dispute regarding the law that controls this case. All parties agree that *Block* and its progeny set forth the relevant legal test for determining whether Congress intended there to be judicial review of this final agency decision. (*See* Section III(A), *supra*.) This Court will rarely grant certiorari review for a mere misapplication of law. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Accordingly, Petitioners' assertion that the Court of Appeals misapplied the law, even if not mistaken, is not a compelling reason for review from this Court.

CONCLUSION

U.S. Energy and Crested respectfully request that this Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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